Government of the District of Columbia
Public Employee Relations Board

In the Matter of:	
Fraternal Order of Police/ Metropolitan Police Department Labor Committee	
Complainant	PERB Case No. 14-U-10
	Opinion No. 1515
v.	
Metropolitan Police Department	
Respondent	

DECISION AND ORDER

I. Statement of the Case

On February 28, 2014, the Fraternal Order of Police/Metropolitan Police Department Labor Committee ("FOP") filed a timely Unfair Labor Practice Complaint ("Complaint" or "ULP") against the Metropolitan Police Department ("MPD"), alleging that MPD violated D.C. Official Code § 1-617.04(a)(1) of the Comprehensive Merit Personnel Act ("CMPA"). MPD submitted an Answer, denying the allegations.

Pursuant to D.C. Official Code § 1-605.2(3) and Board Rule 520.14, the Board has reviewed the findings and conclusions of the Hearing Examiner, adopts the Hearing Examiner's findings and conclusions, except herein noted. Based on the record, the Board finds that MPD committed an unfair labor practice for the reasons discussed below.

II. Hearing Examiner's Report and Recommendation

On July 29, 2014, a hearing took place in the above-captioned matter before Hearing Examiner Earl Shamwell. Based on credibility determinations and evidence presented by the parties, the Hearing Examiner found that MPD had violated the CMPA by its conduct during a meeting with a union member.

A. Background

An MPD officer ("Officer"), represented by FOP, was issued a subpoena to testify at a D.C. Superior Court criminal trial.[1] Upon arrival on the day of the hearing, the Officer attempted to check-in with the MPD Court Liaison Division ("CLD"), which is an administrative component of MPD's Internal Affairs Bureau.[2] According to the Officer, she was told by a CLD worker that she would not need to check-in for the trial, because the subpoena had been issued by the defendant.[3] While waiting to testify, the Officer was approached by two CLD officials. The two CLD officials told the Officer that she could not testify in uniform or with her police pistol, because she had been called as a witness by the defendant.[4] The Officer explained to the CLD officials that she was testifying in her official capacity as a police officer, and that she was acting in accordance with a "general order" on the subject.[5] After some discussion between the CLD officials and the Officer over the issue, the matter was dropped, and the Officer testified at the trial.[6]

According to the Officer, she felt that she might be disciplined after her discussion with the CLD officials. Subsequently, the Officer went to the then FOP Executive Steward Elroy Burton.[7] Burton asked that the Officer submit a written description ("PD 119") of what had happened on the day she had testified.[8] Based on the Officer's account of her interaction with the CLD officials, Burton reviewed the Officer's PD 119 report, and drafted a letter to the D.C. Inspector General, charging MPD with obstruction of justice and witness intimidation in a criminal matter[9]. The Inspector General referred the matter to MPD Chief of Police Cathy Lanier for investigation.

On October 31, 2013, the Officer was directed to report to CLD for an interview. The Officer and a union representative met with CLD Inspector Grogan, who presented the Officer with typed questions. The Officer and her union representative filled out the responses to the questions, and submitted them to Grogan.[10]

On or about November 3, 2013, the Assistant Chief of Internal Affairs Michael Anzallo assigned the matter to Grogan for review and handling.[11] The CLD officials who had questioned the Officer at the courthouse were investigated and exonerated. However, it was determined that a follow-up interview with the Officer should be conducted.

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[1] HERR at 2.
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] HERR at 2-3.
[6] *Id.*
[7] *Id.* at 3.
[8] *Id* at 4.
[9] *Id.*
[10] HERR at 4.
[11] *Id.*

On November 6, 2013, the Officer and her union representative Nicholas Deciutiis met with MPD Internal Affairs Lieutenant Brown and Grogan. Brown and Grogan conducted an interview of the Officer, which was audio recorded.[12] No further interviews were conducted.

B. Hearing Examiner's Findings

MPD argued before the Hearing Examiner that the interviews were permissible under the contract and were not retaliatory.[13] The Hearing Examiner found that the interviews were permissible.[14] However, the Hearing Examiner found, based on the totality of the circumstances, that MPD's conduct at the November 6, 2013 meeting violated the CMPA.[15] In particular, the Hearing Examiner found that Brown and Grogan's questions "implied that when officers have issues with CLD, they had best go through the proper MPD channels, and not the union...."[16] Further, the Hearing Examiner found that the "line of questioning conveyed something in the way of a veiled threat of possible discipline for officers who elected to go to the Union for assistance with CLD concerns, as opposed to resorting to MPD to resolve the problem."[17] In light of the Hearing Examiner's factual findings, he found that MPD had engaged in conduct that violated the CMPA.[18]

C. Hearing Examiner's Recommendation

The Hearing Examiner recommended that the Board order MPD to (1) cease and desist from similar conduct that would violate the FOP's and the union member's rights under the CMPA, (2) cease and desist interrogating the union member and other similarly situated employees about seeking assistance from FOP and inquiring into their discussions about the assistance, (3) post a notice of the violations, and (4) pay FOP's reasonable costs for litigating this matter.[19]

II. Discussion

A. FOP's Exceptions

FOP filed timely Exceptions to the Hearing Examiner's Report and Recommendation, on the grounds that the Hearing Examiner erred when he (1) decided that PERB does not recognize a labor relations privilege, and (2) did not recommend discipline of MPD violators.[20]

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[12] HERR at 5.
[13] *Id.* at 13.
[14] *Id.*
[15] *Id.* at 14-16.
[16] *Id.* at 15.
[17] HERR at 15-16.
[18] *Id.* at 16.
[19] *Id.*
[20] FOP requested that an alleged typographical error be corrected in the Hearing Examiner's Report and Recommendation. As the typographical error does not affect the Hearing Examiner's Report and Recommendation to the extent that it disturbs the Hearing Examiner's findings and conclusions, which is before the Board, the Board declines to address the alleged typographical error as an Exception meriting discussion.

1. Labor Relations Privilege

A Motion to Dismiss was filed by MPD, asserting that FOP's Complaint relied on a labor relations privilege, which is not recognized by PERB, and that the Complaint did not contain allegations that the Board had jurisdiction to consider. In an Order by the Hearing Examiner, the Hearing Examiner concluded that PERB does not recognize a labor relations privilege, but found that the Complaint contained allegations that the Board had jurisdiction to determine.[21] FOP filed Exceptions to the Hearing Examiner's ruling that PERB does not recognize a labor relations privilege.

A labor relations privilege is defined as protection against compelled disclosure of "a confidential communication exchanged between an individual union member and a union official concerning labor relations information, or a confidential communication exchanged between an individual management member and a management official concerning labor relations information."[22] In order for the Board to consider the issue of privilege, the privilege must have been raised at a time prior to the disclosure. No evidence has been asserted or presented that the Officer raised this privilege at any time that she was questioned. Therefore, as the privilege was not invoked at the time of questioning, the Board declines to address the merits of the Hearing Examiner's determination that PERB does not recognize a labor relations privilege, as the issue is not ripe in the present case. The Board denies FOP's Exceptions on the labor relations privilege, and declines to adopt the Hearing Examiner's determination that the Board does not recognize a labor relations privilege, on the grounds that the issue is not ripe in the present case.

2. Discipline

FOP asserts that the Hearing Examiner erred when he did not recommend that MPD discipline the management officials who interviewed the union member. In its Exceptions, FOP asserts no law or Board case law that would require the Board to recommend discipline of management officials to MPD. Therefore, the Board finds that FOP's Exceptions are a mere disagreement with the Hearing Examiner. The Board notes that the Hearing Examiner recommended a Notice posting and an award of costs.

B. MPD's Exceptions

MPD filed timely Exceptions to the Hearing Examiner's Report and Recommendation, arguing that (1) all allegations pertain to the labor relations privilege, which is not recognized by PERB, (2) the Hearing Examiner improperly applied NLRB case law, and (3) the Hearing Examiner considered allegations that were not raised in the Complaint.

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[21] Hearing Examiner's Order.

[22] Rubinstein, Mitchell H., "Is a Full Labor Relations Evidentiary Privilege Developing?", 29 Berkeley J. Emp. & Lab. L. 221, 223 (2008).

1. Allegations all regarded labor relations privilege

MPD asserts the Complaint should be dismissed in its entirety, because all the allegations in the Complaint are related to the labor relations privilege issue, which the Hearing Examiner found does not exist.[23] The Board denies MPD's Exceptions.

As the Board has discussed above, the labor relations privilege was not invoked by FOP, and the labor relations issue is not considered ripe in the present case. MPD argues that the Complaint only alleges that the labor relations privilege was violated, and that the allegations were not separate and distinct from the labor relations privilege violation, requiring the Board to dismiss the Complaint. The Board rejects MPD's argument.

The Board finds that the Complaint contains allegations of the CMPA that are separate and distinct from the labor relations privilege issue. Even though FOP argued that MPD's questioning of the Officer violated the labor relations privilege, FOP also argued that the questioning was improper because MPD violated D.C. Official Code § 1-617.04(a). These allegations can be separated from the labor relations privilege issue, because the labor relations privilege is not determinative of finding a violation. The Board finds that MPD's Exceptions are a mere disagreement with the Hearing Examiner's Report and Recommendation. Therefore, the Board rejects MPD's Exceptions.

2. Matters considered outside of the record

MPD argues that the Board should reject the Hearing Examiner's Report and Recommendation, because the Hearing Examiner erred by considering information outside of the Complaint. MPD asserts that the Hearing Examiner's Report and Recommendation considered facts not included in the Complaint and that the Hearing Examiner based his conclusion on those facts not disclosed in the Complaint.[24] Further, MPD argues that the only unfair labor practice that was alleged specifically related to only Grogan's questions at the November 6, 2013 interview. In addition, MPD asserts that Board Rule 520.3 requires proof of the allegations contained in the Complaint.

Board Rule 520.3(d) states that an unfair labor practice complaint shall contain "[a] clear and complete statement of the facts constituting the alleged unfair labor practice, including date, time and place of occurrence of each particular act alleged, and the manner in which D.C. Code Section 1-618.4(sic) of the CMPA is alleged to have been violated...." MPD asserts that Board Rule 520.3 requires proof. The plain language of the rule does not require proof. Further, the Board has held that a complainant need not prove its case on the pleadings. The complaint must plead or assert allegations that, if proven, would establish the alleged statutory violations.[25] In

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[23] MPD's September 15, 2014 Exceptions.
[24] MPD's Exceptions at 8-9.
[25] *See, Virginia Dade v. National Association of Government Employees, Service Employees International Union, Local R3-06*, 46 D.C. Reg. 6876, Slip Op. No. 491 at 4, PERB Case No. 96-U-22 (1996); *Gregory Miller v. American Federation of Government Employees, Local 631, AFL-CIO and D.C. Department of Public Works*, 48 D.C. Reg. 6560, Slip Op. No. 371, PERB Case Nos. 93-S-02 and 93-U-25 (1994); and *Goodine v. FOP/DOC Labor Committee*, 43 D.C. Reg. 5163, Slip Op. No. 476 at p. 3, PERB Case No. 96-U-16 (1996).

the Complaint, FOP argued that management officials improperly questioned the Complainant the November 6, 2013 meeting, and that at the meeting MPD interfered with, restrained, intimidated, or coerced an employee in exercise of the rights guaranteed by the CMPA in violation of D.C. Official Code § 1-617.04(a)(1), which protects the rights of employees to form, join, or assist any labor organization in accordance with D.C. Official Code § 1-617.06(a)(2).[26] The Complaint made allegations of the time, occurrence, place and manner of the CMPA violations. In short, the Complaint stated enough facts to put MPD on notice of FOP's allegations. This policy is reflected in D.C. Super Ct. Civ. R. 8(a) and (e), requiring that a "plaintiff need only plead sufficient facts such that the complaint 'fairly puts the defendant on notice of the claim against him.'"[27] The Hearing Examiner found that "the gravamen of the Union complaint of unlawful interference, intimidation and coercion and 'prying' by MPD Officials" centered around the November 6, 2013 meeting.[28] This allegation was asserted in the Complaint, argued before the Hearing Examiner, and ultimately decided based on a factual assessment of the record. Therefore, the Board finds that FOP properly pled the allegations for which the Hearing Examiner made his report and recommendation.

In its Exceptions, MPD also attempts to draw parallel reasoning to another similar case, *FOP v. MPD*, PERB Case No. 09-U-50. In that case, even though, the legal principles of CMPA violations were asserted in the complaint, the factual allegations that served as the grounds for the Hearing Examiner's determination that MPD had violated the CMPA were not asserted in the Complaint and the Board declined to find a violation.[29] The present case can be differentiated from PERB Case No. 09-U-50, because the Complaint before the Board contains the factual allegations that at the November 6, 2013 meeting MPD officials improperly pried into and asked questions regarding the Union's representation of the Officer. The Board finds that FOP pled sufficient facts to put MPD on notice of the possible allegations and statutory violations. The Board finds that MPD's Exceptions are a mere disagreement with the Hearing Examiner's findings and conclusions. Therefore, the Board rejects MPD's Exceptions.

3. Improper case law

MPD argues that the Hearing Examiner improperly applied the National Labor Relations Board ("NLRB") case law where PERB's precedent was clear, and that the Hearing Examiner should have applied PERB's found in *AFGE, Local 1403 v. D.C. Office of the Attorney General,* adopting *Wright Line v. NLRB* burden shifting.[30] MPD contends that *AFGE, Local 1403 v. D.C. Office of the Attorney General* is dispositive, stating that PERB's precedent as applied to the present case would require PERB to arrive at a different outcome. In particular, MPD argues that PERB's adoption of the NLRB's *Wright Line* test would require a different outcome than the Hearing Examiner's findings.[31] The Hearing Examiner considered this argument before him,

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[26] Complaint at 4.
[27] *Carey v. Edgewood Management Corp.*, 754 A.2d 951, 954 (D.C. 2000).
[28] HERR at 12.
[29] MPD's Exceptions at 12-13.
[30] MPD's Exceptions at 6.
[31] MPD's Exceptions at 7 (citing *Neal v. D.C. Dep't of Human Resources*, PERB Case No. 98-U-05 (2001)(adopting *Wright Line v. Bernard L. Lamoureux*, 251 NLRB 1083 (1980), enf'd 662 F.2d 899 (1st Cir. 1981, cert den. 455 U.S. 989 (1982)).

and found that MPD's arguments were based on construing FOP's allegations as assertions that the interviews were conducted as retaliation against the Officer for going to her union representatives.[32] The Hearing Examiner rejected MPD's arguments, because he agreed with MPD that the interviews were permissible and not retaliatory, and that the Complaint alleged improper conduct by the management officials at the interview. Specifically, the Hearing Examiner differentiated a violation of D.C. Official Code § 1-617.04(a)(3), involving retaliation, as opposed to D.C. Official § 1-617.04(a)(1), which the Hearing Examiner found applicable, because he determined that the Complaint alleged that MPD interfered with, restrained or coerced the Officer in the November 6, 2013 meeting.

In addition, the Board finds that MPD's argument based upon *AFGE v. OAG* can be differentiated from the present case. In *AFGE v. OAG*, the Hearing Examiner found that, based on all the circumstances of the case, the questionnaire provided to the union official directly related to OAG's managerial authority and was not accompanied with threats of discipline and reprisal.[33] The conduct of the MPD officials in *AFGE v. OAG* was not part of the factual findings of the Hearing Examiner. In contrast, the Hearing Examiner in the present case made a factual determination based on the circumstances of the case and found that the conduct and line of questioning by the MPD official was intimidating and threatening. The Board finds that MPD's Exceptions that the Hearing Examiner applied the wrong case law is actually a mere disagreement with the Hearing Examiner's factual findings regarding MPD's conduct. The Board has held that "issues of fact concerning the probative value of evidence and credibility resolutions are reserved to the Hearing Examiner."[34] MPD's Exceptions do not assert grounds for overturning the Hearing Examiner's findings.

In FOP's Opposition, FOP argues that the Hearing Examiner relied on PERB case law to arrive at his conclusion that the proper test to apply is "whether the conduct in question had a reasonable tendency in the totality of circumstances to interfere with, restrain or coerce the employee."[35] The Board finds that the Hearing Examiner applied the appropriate PERB case law.

Further, the Hearing Examiner's analysis of whether MPD intimidated the Officer was proper. As the FLRA has articulated:

> The standard for determining whether management's statement or conduct independently violates § 7116(a)(1) [prohibiting the agency from interfering with, restraining, or coercing any employee in the exercise by the employee of any right under the FLRA] is an objective one. The question is whether, under the circumstances, the statement or conduct tends to coerce or intimidate the employee, or whether the employee could

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[32] HERR at 12.
[33] AFGE v. OAG, 2008 WL 4537674, at 5.
[34] *Council of School Officers, Local 4, American Federation of School Administrators v. District of Columbia Public Schools*, 59 DC Reg. 6138, Slip Op. No. 1016 at p. 6, PERB Case No. 09-U-08; *Tracy Hatton v. FOP/DOC Labor Committee*, 47 D.C. Reg. 769, Slip Op. No. 451 at p. 4, PERB Case No. 95-U-02 (1995).
[35] FOP Oppositions at 4 (citing HERR at 11 and *FOP/D.C. Housing Labor Committee v. D.C. Housing Authority*, Slip Op. No. 1410, PERB Case No. 11-U-23 (2013)).

> reasonably have drawn a coercive inference from the statement. Although the circumstances surrounding the making of the statement are considered, the standard is not based on the subjective perceptions of the employee or on the intent of the employer. The standard is satisfied where, *inter alia*, a statement explicitly links an employee's protected activity with treatment adverse to the employee's interests.[36]

In the present case, the Hearing Examiner made a factual determination, having been presented with the audiotaped meeting, that management's "line of questioning conveyed something in the way of a veiled threat of possible discipline for officers who elected to go to the Union for assistance with CLD concerns, as opposed to resorting to MPD to resolve the problem." The Board finds that the Hearing Examiner's conclusions are reasonable and supported by the record. Therefore, the Board finds that MPD's Exceptions are a mere disagreement with the Hearing Examiner's determination, and rejects MPD's Exceptions.

C. Conclusion

The Board finds that the Hearing Examiner's findings, conclusions and recommendations, as discussed above to be reasonable, persuasive and supported by the record. The Exceptions filed by both parties were without merit. The Board adopts the Hearing Examiner's Report and Recommendation finding that MPD violated D.C. Official Code § 1-617.04(a)(1), by MPD's conduct during a November 6, 2013 meeting where the questioning was found to be intimidating and threatening. The Board declines to determine the issue regarding the labor relations privilege as it is not ripe in the present case.

ORDER

IT IS HEREBY ORDERED THAT:

1. The District of Columbia Metropolitan Police Department, its agents and representatives, shall cease and desist from interfering with, restraining, or coercing the Fraternal Order of Police/Metropolitan Police Department Labor Committee and any bargaining unit employees in exercise of their rights guaranteed by the Comprehensive Merit Personnel Act.
2. MPD shall cease and desist from interrogating bargaining unit employees about their decision to seek assistance from FOP; what they might expect to receive from such assistance; whether they intended to file a grievance with FOP; and why they did not bring their concerns to MPD officials, as opposed to FOP.
3. MPD shall conspicuously post within ten (10) days from the issuance of this Decision and Order the attached Notice where notices to bargaining unit members are normally posted. The Notice shall remain posted for thirty (30) consecutive days.
4. MPD shall pay FOP all reasonable costs associated with this matter.

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[36] *FAA v. NATCA*, 64 FLRA 365 (December 31, 2009).

5. MPD shall advise PERB within thirty (30) days of the date of the date of issuance of this decision of the actions that have been taken to implement this Order.

6. Pursuant to Board Rule 559.1, this Board's Decision and Order is final upon issuance.

BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD

By unanimous vote of Board Chairperson Charles Murphy, Member Yvonne Dixon, Member Ann Hoffman, Member Keith Washington, and Member Donald Wasserman

Washington, D.C.

March 19, 2015

CERTIFICATE OF SERVICE

This is to certify that the attached Decision and Order and Notice in PERB Case No. 14-U-10 was transmitted to the following parties on this the 26th day of March, 2015.

Daniel J. McCartin, Esq. **via File&ServeXpress**
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NOTICE

TO ALL EMPLOYEES OF THE METROPOLITAN POLICE DEPARTMENT ("MPD"), THIS OFFICIAL NOTICE IS POSTED BY ORDER OF THE PUBLIC EMPLOYEE RELATIONS BOARD PURSUANT TO ITS DECISION AND ORDER IN SLIP OPINION NO. 1515, PERB CASE NO. 14-U-10.

WE HEREBY NOTIFY our employees that the District of Columbia Public Employee Relations Board has found that we violated the law and has ordered MPD to post this Notice.

WE WILL cease and desist from violating D.C. Code § 1-617.04(a)(1) by the actions and conduct set forth in Slip Opinion No. 1515.

WE WILL cease and desist from interfering, restraining, or coercing employees in the exercise of rights guaranteed by the Labor-Management subchapter of the Comprehensive Merit Personnel Act ("CMPA").

WE WILL NOT, in any like or related manner, interfere, restrain or coerce employees in their exercise of rights guaranteed by the Labor-Management subchapter of the CMPA.

Metropolitan Police Department

Date:_____ By:_____

This Notice must remain posted for thirty (30) consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Public Employee Relations Board, whose address is: 1100 4th Street, SW, Suite E630; Washington, D.C. 20024. Phone: (202) 727-1822.

BY NOTICE OF THE PUBLIC EMPLOYEE RELATIONS BOARD

Washington, D.C.

March 26, 2015